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Hon. Loretta A. Preska
United States District Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1320
New York, New York 10007-1312

Re: *EMI April Music Inc., et al. v. Electronic Arts Inc.* (04 CV 3065)

Dear Judge Preska:

We are counsel for defendant Electronic Arts Inc. ("EA") in the above-referenced matter. Pursuant to Your Honor's Individual Practice Rule 2(A), we are writing to raise the issue of bifurcating the liability and damages phases of this litigation in order to allow the parties to conduct discovery and litigate the issue of liability first, and then, only if necessary, proceed with the issue of damages. We initially made this proposal to counsel for plaintiffs EMI April Music Inc., EMI Blackwood Music Inc., EMI Unart Catalog Inc., and EMI Virgin Songs, Inc. (collectively, "Plaintiffs" or "EMI") during our meet and confer on August 6, 2004. EMI, however, has rejected our proposal. Accordingly, we wanted raise this issue at this time so that the Court could consider EA's proposal at the initial court conference on September 8, 2004.

EA is the world's leading independent developer and publisher of video and computer games. Since its inception in 1982, EA has been a leader in its field, innovating and improving interactive gaming. EA has garnered more than 700 awards for outstanding software in the United States and Europe and has over 33 product franchises that have reached more than a million unit sales worldwide. Some of EA's most popular game franchises include *The Sims, Madden NFL, Harry Potter, Lord of the Rings,* and *James Bond.* EA's business depends on the protection of its intellectual property rights, as well as the protection of the intellectual property rights of third parties from whom EA licenses a myriad of intellectual property.

EMI is one of the music publishers from whom EA licenses musical compositions to include in its games. EA and EMI have done business together for years, pursuant to which they agree on the material elements of a deal to include an EMI-owned or controlled musical composition in an EA game and then, after the particular game is released and the parties are certain that the song is actually included in the game, they draft a formal "long-form"

Plaintiff shall respond by letter (faxed to the Court) no later than September 7 at 3:00 pm.
August 27, 2004

SO ORDERED
Loretta A. Preska
LORETTA A. PRESKA
UNITED STATES DISTRICT JUDGE

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agreement to memorialize their prior agreement in detail. EA and EMI have entered into binding agreements with regard to all musical compositions owned or controlled by EMI that have been included in EA games.

Apparently, EMI is no longer content with its business relationship with EA and has filed this lawsuit for copyright infringement in order to pressure EA to "radically" (in EMI's words) change the way it does business. To put it simply, EMI is unhappy with the normal flat license fee it receives from EA and instead wants a per-unit royalty. To accomplish this objective, EMI is suddenly arguing for the first time that it does not have an agreement with EA permitting EA to use EMI-owned or controlled musical compositions in games because long-form agreements had not been signed prior to the release of the games. Of course, whether or not a long-form agreement has been signed is not determinative as to whether the parties reached a deal. In fact, it is routine practice in the entertainment industry to enter into binding deals without long-form agreements ever being signed. As the evidence will demonstrate, EA entered into a binding agreement to use each musical composition at issue that is included in an EA game. Thus, while EMI is free to negotiate amendments to its existing agreements with EA or future deals with a new form of consideration in the future, EMI cannot renege on its binding agreements with EA.

We respectfully contend that bifurcation of the liability and damages phases of this litigation is especially appropriate in this case. Pursuant to its amended complaint, EMI has alleged copyright infringement regarding various musical compositions that are included in various EA games. EA's principal defense is based on the fact that EA has the requisite permission to use all of the musical compositions that are included in EA's games. In support of EA's position, witnesses will testify as to the terms of the agreements, as well as the negotiations and communications between the parties and others, for each EMI-owned or controlled musical composition at issue that is included in an EA game. Accordingly, the liability phase of this litigation will be straightforward, focusing on whether the parties reached a deal for each EMI-owned or controlled musical composition at issue that is included in an EA game and whether EA exceeded the scope of the parties' agreements by including certain musical compositions in certain EA games with online functionality. Indeed, EA expects that the issue of liability can be determined by summary judgment in its favor. Of course, if EA is successful on summary judgment, there will be no need to reach the issue of damages.

In contrast to liability, the issue of damages will be very complex, requiring extensive expert and factual testimony. In essence, EMI will argue that it is entitled to some fraction of the profits from EA's games at issue. Thus, for each EMI-owned or controlled musical composition at issue that is included in an EA game, the parties will have to determine the relative contribution or value of that particular song to that particular EA game. Obviously, this process will be very time-consuming and fact-intensive, involving a host of different variables that will undoubtedly differ by song and by game. Significantly, the evidence regarding damages will not overlap with evidence regarding liability, rather it will include fact witnesses testifying as to the relative contribution of each musical composition to the EA game, as well as accounting experts, financial experts, and valuation experts. Notably, this complicated exercise will have to be done not just once, but multiple times – for each EMI-owned or controlled song and EA game at issue

– thereby making the process even more time-consuming, burdensome, and expensive. This exercise will place a great demand on the jury's time and attention as, potentially, the jury will have to decide the issue of liability for each of the over 30 musical compositions at issue, and then will have to engage in multiple mini-trials to assess the value of each musical composition to one of the twelve different games at issue. If, however, the issue of liability is dealt with and resolved initially, we believe that the complicated issue of damages will be mooted or at least (in a worse case scenario from EA's point of view), significantly narrowed, resulting in a tremendous savings of time and resources for the Court and the parties.

Accordingly, we think that this case warrants bifurcation of the issues of liability and damages, as to both discovery and trial, in order to proceed in logical, efficient stages. *See, e.g.*, *Red Ant, L.L.C. v. Sony Music Entertainment, Inc.*, No. 97 Civ. 4917, 1998 WL 249195, at *3 (S.D.N.Y. May 15, 1998) (granting motion to bifurcate the issues of liability and damages as to both discovery and trial in order to first determine the issue of authorship of the lyrics to a musical composition); *see also Wills v. Amerada Hess Corp.*, __ F.3d __, 2004 WL 1784593, at *6 (2d Cir. Aug. 11, 2004) (recognizing "the district court's broad discretion to direct and manage the pre-trial discovery process").

EA is prepared to move swiftly in this case concerning the issue of liability in order to vindicate EA's rights. Immediately after the meet and confer, EA served its initial discovery requests and deposition notices concerning liability issues on EMI. We note that EMI has not served any discovery requests on EA at this point.

For the reasons set forth above, EA respectfully requests that the Court bifurcate the liability and damages phases of this litigation, including discovery, in order to allow this case to proceed in the most streamlined and efficient manner with the least burden on the Court and the parties. Thank you for your consideration.

Respectfully submitted,

Dale Cendali

Dale Cendali
of O'MELVENY & MYERS LLP

cc: Gregory Clarick, Esq. (Counsel for Plaintiffs)